Supreme Court, U.S.
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No. 92-1823

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LORRAINE JOHNSON, as Special Administratrix of the Estate of GORDON JOHNSON, Deceased,

Petitioner,

v.

JESSE ROSS, Representative of the Estate of WILLIAM ROSS, Deceased, and OLLIE BELLE ROSS, Individually,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

I.

RESPONDENT HAS FAILED TO RESPOND TO THE ISSUES RAISED IN THE PETITION FOR A WRIT OF CERTIORARI.

In his Brief in Opposition to the Petition for a Writ of Certiorari, the Respondent has not addressed the argument raised in the Petition that the rule invoked by the Seventh Circuit to dismiss this Appeal impermissibly restricts its jurisdiction in a fashion not authorized by congressional action or the decisional law of this Court. Nor

does he cite authority to refute the contention that several other circuits consider their appellate jurisdiction over pretrial appeals of Orders denying immunity in civil rights cases as a matter of law to be much broader than does the Seventh Circuit. This conflict in the circuits thus remains.

Nor does he respond to Petitioner's argument that the extent, if any, to which public officials who respond to scenes such as that which confronted Johnson may weigh the competing interests of those in need of rescue and the well being of persons who, perhaps unwisely, volunteer to enter those perilous situations is unsettled but nonetheless an important and recurrent question confronting state and local governments and thus a proper basis upon which to grant certiorari, see, *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 194 (1989).

Respondent's Brief in Opposition rather, misperceives the posture of this case in its "question presented" and then concentrates on two arguments which cannot be reconciled with one another.

The first of these is that the facts on the fully developed record are precisely as set forth by the Court of Appeals in its summary of the allegations of his Complaint in the first appeal. He thus reasons that Petitioner is precluded under the doctrine of law of the case from even pleading the defense of qualified immunity.

His Brief then assumes an internal inconsistency by arguing that a grant by this Court of a Writ of Certiorari would ultimately prove improvident since the immunity issue is so bound up with factual disputes that it cannot be resolved without a trial. The strength of this argument has been cast in some doubt by recent action of this

Court, see, *City of Seattle v. Bascomb*, 507 U.S. ____, 113 S.Ct. 1837 (1993).

Logic dictates that both of these arguments cannot be correct. Substantive law and the record of this case dictate that neither is correct.

II.

RESPONDENT'S "QUESTION PRESENTED" DOES NOT ACCURATELY STATE THE CASE.

The question Respondent presents to this Court on the first page of his Brief in Opposition does not correctly state the circumstances of this case. Respondent questions whether Defendant should be allowed to file multiple pretrial appeals on the "same issue" of qualified immunity. However, this case does not involve multiple appeals by a Defendant since this is the first and, therefore, only appeal which Petitioner has filed.

Respondent is also incorrect to state that this appeal invokes the same issue as the earlier appeal prosecuted by the Respondent. The issue then was whether Respondent's Complaint and any favorable inferences to be drawn therefrom sufficiently alleged a violation of clearly established law.

However, the issue on which Petitioner sought review in this appeal is whether or not, within the factual contours of this case as borne out through discovery, all reasonable officers with Johnson's training in possession of that information which Johnson was aware and confronting the situation that Johnson faced would have known that by acting as Johnson did they would be depriving Respondent's decedent of rights secured to him by the Constitution. Unless this question can be answered in the affirmative, Johnson is immune from suit, *Malley*

v. Briggs, 475 U.S. 335, 341 (1986); *Hunter v. Bryant*, 502 U.S. ____, 112 S.Ct. 534, 537 (1991). Respondent bears the burden of proving that answer, *Davis v. Scherer*, 468 U.S. 183, 197 (1984).

Respondent also, in an attempt to minimize the national importance of the questions raised in this case, argues that Petitioner should not be allowed a pretrial appeal since the issue of qualified immunity "turns on the numerous factual questions germane solely to this case . . .". This ignores the fact that qualified immunity must always be determined within the factual contours of the particular case, *Anderson v. Creighton*, 483 U.S. 635, 639-642 (1987). Nor, for reasons which will be discussed below, are there unresolved factual disputes requiring a trial which are relevant to the immunity question.

III.

THE RECORD PRESENTS NO GENUINE DISPUTES OF MATERIAL FACTS SUFFICIENT TO PRECLUDE SUMMARY JUDGMENT ON THE BASIS OF QUALIFIED IMMUNITY.

The District Court denied Petitioner's Motion for Summary Judgment on qualified immunity summarily and solely as a matter of law (App. to Pet. for Cert. A-33).

The Court of Appeals also dismissed Petitioner's appeal solely as a matter of law by invoking what to that point had been an unarticulated rule in the circuit that Johnson could not maintain a pretrial appeal on the issue of immunity because the Plaintiff had previously prosecuted an Appeal of a final judgment adverse to her on that issue (App. to Pet. for Cert. A-1, A-34, 35).

Neither Court based its ruling on any unresolved factual issues in the record before it.

Respondent purports to raise factual issues such as the water temperature where Ross was recovered, the speed of the recovery made by the public safety diver and the fact that Ross, though never regaining consciousness, did not die until several hours after recovery from the lake. She also argues that due to the claimed coolness of the water that Ross would have lived if Johnson had not acted (Brief in Opposition, pp. 12-13). Initially, Petitioner notes that there was absolutely no mention of the water temperature where Ross was found or of any purportedly life extending properties of cold water in the materials presented to the District Court by the parties on Johnson's Motion for Summary Judgment. Yet, no harm is done since these matters are not relevant to this claim for it is undisputed that none of them were known to Johnson when he acted. They are, therefore, not material to a qualified immunity determination.

Nor is consideration of these facts necessary to answer the purely legal question of whether or not it was clearly established on August 11, 1985 that a public officer responding to the scene where an individual had been submerged for a time which was longer than his training taught him was survivable could restrain volunteer rescuers in favor of trained public safety divers he knew were coming out of concern for the safety of the would-be volunteers, see, *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. ____, ____, 113 S.Ct. 684, 689 (1993).

A claim of qualified immunity requires examination of the information possessed by the Defendant at the time he acted, *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

Respondent's claim that factual disputes preclude consideration of Johnson's immunity as a matter of law fails to consider that such disputes will require a trial only when they create *genuine* issues of *material* fact (em-

phasis in original), *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). Those factual disputes which Respondent attempts to identify in this case do not address information known by Johnson at the scene and, therefore, are not material to the issue of qualified immunity rendering them irrelevant and unnecessary to consideration of that issue, *id.*

Also, Respondent's reliance on events which either occurred after Johnson acted or of which he was not aware when he acted is unpersuasive since the objective reasonableness of Johnson's conduct must be judged from the prospective of a reasonable officer in possession of that information which Johnson knew at the time he acted and in light of the circumstances which he confronted rather than from the 20/20 vision of hindsight, *Graham v. Connor*, 490 U.S. 386, 396-398 (1989). Whether or not a reasonable officer could have believed Johnson's conduct to be lawful must also allow for the fact that he was called upon to act in circumstances which were tense, uncertain and rapidly evolving, *id.*

While *Graham* was decided in the Fourth Amendment context, the analysis there is the same as in a case of qualified immunity. In each the test is of objective reasonableness, *Graham*, 490 U.S. at 398; *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982).

Respondent claims that Johnson engaged in "after the fact justification for preventing the rescue attempts" and that the facts upon which Petitioner relies to establish that defense are "highly contested" (Respondent's brief in opposition page 6). Yet the record is clear and uncontested regarding what Johnson knew and observed at the time he acted. That he had been trained that a person would die in five minutes of submersion, that Ross had been under as long as thirteen minutes by the time he arrived at the scene,

that he knew public safety divers were on the way, that those divers arrived at the breakwater within less than two minutes of Johnson's arrival at the scene, that Ross could not be seen in the water, that Johnson himself was a member of a fire department dive team as well as a public safety diving organization which stressed that for safety reasons no individual who was not trained in the dangers of rescue and recovery diving should be allowed to participate in recovery dives is all undisputed.

What Respondent is really contesting is Johnson's intent or his actual motive at the time he acted. Yet since *Harlow* was decided, questions of intent are irrelevant to an analysis of the "objective reasonableness" of a Defendant's actions. Whatever Respondent might claim Johnson's subjective belief to have been at the time is irrelevant, *Anderson*, 483 U.S. at 642.

Respondent agreed in the District Court that the facts in the second preceding paragraph were true but contested the conclusion that those factors provided the motivation for Johnson's acts. His argument misses the mark however, since even if it were true as Respondent contends, that Johnson's actual intent was not so benign, he would still be entitled to immunity if another reasonable officer possessed of that knowledge would have thought Johnson's conduct was lawful. Respondent's argument that the facts are in dispute is an attempt to reintroduce a subjective component which *Harlow* removed from the qualified immunity defense, see, 457 U.S. at 815-820. While the issue of Johnson's intent might be relevant to the ultimate question of the merits of Plaintiff's claim that Johnson deprived Ross of due process, it is not relevant, and is expressly excluded by *Harlow*, from the purely legal question of whether the legal norms allegedly violated by Johnson were clearly established at the time of

his challenged actions, *Mitchell v. Forsythe*, 472 U.S. 511, 527-530 (1985).

The unstated thrust of Respondent's argument is that he feels that the question of whether or not Johnson's conduct was reasonable should be resolved by a jury. Such a claim, however, is in direct conflict with this Court's determination that it is for the Court, not a jury, to decide whether Johnson acted reasonably under settled law in the circumstances and not whether another reasonable, or more reasonable, interpretation of the events can be constructed years after the fact, *Hunter*, 502 U.S. at ____, 112 S.Ct. at 537.

All of which leads to another question. Has Respondent even stated a due process violation in the first instance? See, *Siegert v. Gilley*, 500 U.S. ____, ____, 111 S.Ct. 1780, 1793 (1991). Due process claims require that the state action said to have caused the deprivation be arbitrary since the due process clause of the Fourteenth Amendment is not implicated by a governmental official who causes an unintentional injury, *Daniels v. Williams*, 474 U.S. 327, 332 (1986). Historically, the guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty or property, *Collins v. City of Harker Heights, Texas*, 503 U.S. ____, ____ n.10, 112 S.Ct. 1061, 1069 n.10 (1992).

Petitioner submits that Johnson's conduct was not arbitrary or conscious shocking in the constitutional sense. This Court has unanimously held that the provision of governmental services is based on a rational decision making process which must take into account competing interests, 503 U.S. at ____, 112 S.Ct. at 1070. In this case, those interests included the remote probability of Ross being retrieved from the lake alive and the real danger perceived by Johnson of death or injury to the volunteers

at the end of the breakwater and the two sport divers who arrived in their boat. Each of those interests are worthy of governmental consideration yet it is not clearly established at what point one is predominate over the other.

This Court is reluctant to expand the concept of substantive due process because the guideposts for responsible decision making in this uncharted area are scarce and open ended, *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 225-226 (1985).

Respondent has never contended that Johnson intended that Ross die. This Court has not held (and thus it could not be clearly established) that any mental state less culpable than intent will implicate the due process clause, *Daniels*, 474 U.S. at 334 n.3.

Relying on dicta from its earlier decisions, the Court of Appeals found that the well pled allegations of Plaintiff's Complaint and all favorable inferences derived therefrom could support the conclusion that Johnson's conduct was reckless, while at the same time recognizing that "there is no suggestion in the Complaint that Johnson maliciously desired the boy to die" (App. to Pet. for Cert. A-29). The Court also found that it was clearly established on the date of the incident that "a citizen in peril for his life had a constitutional right that prevented a police officer from cutting off private avenues of life saving rescue without providing an alternative" (App. to Pet. for Cert., A-27-28). This conclusion, however, implies that by acting as he did Johnson created a "special relationship" between himself and William Ross.

The ruling of the Seventh Circuit however, extends beyond those circumstances where such special relationships have been recognized by this Court. This Court has

only found such relationships which create a duty of protection when it has been the state which forcibly took the individual into its custody and completely restrained that individual's liberty, *DeShaney*, 489 U.S. 198-99. At no point did Johnson deprive William Ross of his freedom to act. The constitutional right which the Seventh Circuit found to exist in its earlier opinion in this case is broader than any theretofore recognized and in fact parallels the dissent in *DeShaney* which maintained that the state cannot cut off private sources of aid and then refuse aid itself, 489 U.S. at 207 (Brennan, J., dissenting).

William Ross was killed by Lake Michigan and not by Gordon Johnson. Neither Johnson nor any other state actor had any role in placing Ross in his position of peril. Nor did Johnson intend that Ross die. Ross' death, therefore, is not the result of intentional conduct which implicates his due process rights under the Fourteenth Amendment.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari to the United States Court of Appeals to the Seventh Circuit should be granted.

Respectfully submitted,

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